

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 147 of 1997

For Approval and Signature:

HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE J.R.VORA

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy of the judgement? : YES
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
 5. Whether it is to be circulated to the concerned Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals? : YES

KISHORBHA8I BHANABHAI CHAVDA

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 147 of 1997
MR US BRAHMBHATT for Petitioner No. 1
MR AJ DESAI, APP, for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 31/03/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE B.J.SHETHNA)

1. The Appellant - accused Kishorbhai Bhanabhai Chavda, presently aged 33, has filed this Appeal, through Jail, and challenged his order of conviction and sentence dated 27.1.1997, passed by the learned Sessions Judge, Valsad at Navsari, in Sessions case No.31 of 1996, whereby the learned Judge found the appellant-accused guilty for committing murder of his wife Ushaben on 7.10.1995 at 11.00 a.m. in their own residence at Dhobi Talav, Valsad by pouring kerosene on her and then setting her ablaze and convicted for the offence u/s.302 I.P.Code and sentenced him to suffer Life Imprisonment and to pay fine of Rs.500/- i/d to under-go one month S.I.

2. It is the case of the prosecution that deceased complainant Ushaben was staying with her husband present appellant - accused and her mother - in - law together in one house. Her husband was doing the labour work of Sofa Repairing. Prior to the date of incident i.e. on 7.10.1995 they got married before 2-1/2 years and out of their wedlock they had minor son Kiran, aged 1-1/2 years. It is further the case of the prosecution that since last 2 years of the incident the accused was quite often quarreling with deceased Ushaben in a drunken condition and telling her to give divorce. Because of that twice or thrice Ushaben had gone to her parents house and at that time also her husband was following her and abusing about her character and looking at her with suspicious eyes and also beating her.

On the date of incident i.e. on 7.10.1995 Ushaben was in her house. At about 10.30 or 11.00 a.m. the accused came from somewhere and started quarreling with her and gave her serious beating by saying that why she was not giving him divorce and thereafter he took the kerosene tin and poured at her and then set her ablaze. Thereupon, Ushaben raised shout 'save' 'save'. On hearing her shouts her neighbours Kamuben, Jiviben, Jayantilal, brother in law of Kishor and accused, had come there running and sprinkled water on her and saved her and immediately removed her to the Municipal Hospital in rickshaw. Prior to this incident also the accused had given poison to Ushaben in the food and also attempted to forcibly consumed poisonous medicine. The police recorded F.I.R. of Ushaben at 6.00 p.m. on 7.10.1995 against the appellant-accused for the offence u/s.307 I.P.Code. Ushaben was given treatment in the Hospital, but unfortunately succumbed to her injury on 10.10.1995 at 6.00 pm. in the hospital. Therefore, offence u/s.302 I.P.Code was added. After completing the investigation the Police filed charge-sheet against the accused for the

offence u/s.302 I.P.Code. The learned Magistrate committed the case to the Court of Sessions against the accused. To prove its case the prosecution has relied upon the evidence of several witnesses as well as the documentary evidence in the form of Dying Declaration made by deceased Ushaben, Panchnama of scene of offence, Inquest Panchnama, etc. In the instant case the accused had come out with a specific defence in his statement u/s.313 Cr.P.C. and stated that he had good relations with his wife. There was a love marriage between him and his wife and because of that his mother-in-law and brother-in-law Govind Premji and sister-in-law Kankuben were hostile to him. At the time of incident he had gone to market. When he came to his house he found his wife burnt. Thereupon, he called Jayantibhai and, along with Jayantibhai, he had taken his wife to the Hospital. His wife was getting fit and falling down anywhere. Her treatment was going-on in Nair Hospital at Mumbai. Thus, he has not committed any offence.

3. The learned Sessions Judge, by her typed Judgment, running into 18 pages, came to the conclusion that the prosecution has proved its case against the accused beyond reasonable doubt for committing murder of his wife deceased Ushaben and, therefore, convicted him for the offence u/s.302 I.P.Code and sentenced him, as stated earlier, by discarding the defence of the accused. This is under challenge in this Appeal.

4. This being the jail Appeal and that appointed Advocate Shri Brambhatt, not having much practice on criminal side, appearing before us in this Appeal for the Appellant - accused, therefore, with the assistance of learned APP Shri Desai, we have gone through the relevant evidence in this case and the impugned Judgment passed by the learned Sessions Judge. From the Judgment of the learned Sessions Judge, we find that the learned Judge has assigned the reasons for conviction in Para : 19 of her Judgment which are not at all convincing. In the instant case the incident in question took place at about 10.30 am and deceased Ushaben was taken to the Hospital by none-else, but by her husband - present appellant accused, along with Jayantibhai.

5. Dr.Ram Ratan Ramavat, Chief Medical Officer of Valsad Municipal Hospital, P.W.4, Ex.16, has stated in his evidence that deceased Ushaben was brought to his Hospital on 7.10.1995 at 11.20 a.m. At that time she was fully conscious. He had examined her. On being personally asked the deceased Ushaben gave his history that when she was cooking on kerosene stove at that time

all of a sudden accidentally she was burnt. On examination he found that she had burns injuries on her face, on chest and back, on both the legs as well as both the hands and she had 75 % of burns injuries and they were all either first or 2nd degree burns. She was, therefore, admitted in the Hospital for the treatment. They had come to the Hospital without Police yadi, therefore, he had informed the P.S.O. Anandbhai of City police Station, Valsad at 11.40 a.m. As there was no free treatment and the economic condition of Ushaben was not good, therefore, at her request she was once again sent to the Civil Hospital, Valsad at 12.00 noon on the next day i.e. on 8.10.1995. He had given the Certificate of treatment in his own hand-writing with signature at Ex.17. In his cross-examination he had stated that after taking the history from Ushaben he had not inquired any other things. He was not able to state in his cross examination as to whether Ushaben was in a condition to sign or not. He was also not able to state as to whether the skin of fingers of Ushaben were removed or not. However, he has stated in his cross-examination that Ushaben was suffering acute pain and shouting lot. Looking to the yadi, marked 18/1, he stated that Police men had come to him on 7.10.1995 at 10.50 am. When the Executive Magistrate, Nirmalaben, P.W.3, Ex.13, recorded the Dying Declaration of deceased at that time he was not present and he cannot say what must be the condition of Ushaben at that time. He has also stated in his cross-examination that when the Police recorded the statement of Ushaben at that time he was not present and he is not aware when the Police took the compliant of Ushaben. He cannot say what must be the condition of Ushaben at the time of lodging the complaint.

6. From the above evidence of Dr.Ramavat, PW 4, Ex.16, it is clear that when the deceased Ushaben was brought to the Hospital immediately after the incident at that time she was absolutely conscious and she gave the history to this Dr.Ramavat that while cooking on kerosene stove she received these burns injuries. Except this, she has not stated anything else to this doctor. This is not only borne out from the Certificate Ex.17, issued by Dr.Ramavat that it was a case of accidental burns, but also from the case papers Ex.19 (which is not included in this Paper book). It is clearly mentioned in the case papers at Ex.19 of deceased Ushaben with history of accidental burns due to burst of kerosene stove while cooking. She was admitted in the hospital at 11.20 am. and transferred to Civil Hospital on the next day i.e. on 8.10.1995 at 12.00 noon. It also shows that Doctor had informed the PSO Anandbhai of City Police Station,

Valsad at 11.40 a.m. on 7.10.1995. It is interesting to note that House Surgeon Note in the case paper also shows that it was a case of accidental burns caused with sprinkling of kerosene while fueling the stove and that deceased was sitting with her mother-in-law, husband and minor son, aged 1-1/2 years old. Obstretic history of the patient was also mentioned coupled with menstrual history.

It is no doubt true that Dr.Ramavat was not in a position to categorically state in his evidence before the Court that skin of the fingers of the deceased had come out after the incident, but there is clear evidence of another Dr.Bharatbhai, who had performed the Post Mortem of deceased Ushaben, PW 5, Ex.20. He has further stated in his Cross Examination that with these injuries one can hold pen if there was no pain, but if there is a pain then one cannot hold the pen. Dr.Ramavat, PW 4, Ex.16, has clearly stated in his evidence that when Ushaben was brought to the Hospital she was having acute pain and shouting a lot. Thus, it is absolutely clear that Ushaben may not be in a position to even hold the pen. If that is so then there is no question of her signing on subsequent so called dying declarations which are heavily relied upon by the learned Judge for convicting the appellant - accused.

7. We are really disappointed with the reasoning assigned by the learned Judge, for convicting the appellant - accused, in her Judgment. In Para : 7 at running Page : 165 of the compilation she has recorded the statement of learned APP that the Doctor has not stated in his written note that, who had given the history and possibility of such history given by the relatives cannot be ruled out. The history of incident narrated by the deceased at the earliest point of time before the independent witness like Dr.Ramavat, PW 4, Ex.16, who is a responsible Medical officer, should have been given due weightage by the learned Judge. Unfortunately, absolutely on a flimsy grounds, mentioned in para ; 19 of her Judgment, she has refused to place reliance on first Dying Declaration of deceased Ushaben, which shows that it was a case of accidental burns by stating that immediately after the incident she was first removed to Valsad Civil Hospital and thereafter she was brought to Municipal Hospital, Valsad. Therefore, possibly she might have given such history to the Doctor of Valsad Municipal Hospital, as she may be under the impression that if she disclose the true story then she might not get treatment and because of that she might not given the history of accidental burns. Thus, therefore,

her first version narrated before Dr.Ramavat of Valsad Municipal Hospital seems to be not true. We are really shocked that this type of reasoning given by the learned Judge for discarding the first earliest version made by the deceased before the responsible person, like Dr.Ramavat. It left us much to desire.

It is most unfortunate that the learned Judge has not even bothered to consider the Panchnama of scene of offence which rather supports the first theory of accidental burns. The learned Judge has miserably failed to consider the defence statement of the accused made u/s.313 Cr.P.C. wherein the accused had come out with a case that at the time of incident he was not at home, when he returned he saw his wife in a burnt condition and, therefore, he called Jayantibhai and took his wife to the Hospital. He had very good relation with his wife as there was a love marriage which was not liked by her mother-in-law, brother-in-law and sister-in-law and because of that they were hostile free. The subsequent conduct of the appellant - accused taking his wife immediately to the Civil Hospital and then to Valsad Municipal Hospital and informing his mother-in-law Rajiben, PW 6, Ex.22, on Phone at Mumbai about her daughter getting burns and going to the Valsad Railway station to receive his mother-in-law and bringing her to the Valsad Municipal Hospital in Auto-rickshaw, clearly suggest that it was a case of accidental death. Recording of statement of the accused u/s.313 Cr.P.C. is not a mere formality. The accused has to probablise his defence. He has not to prove beyond reasonable doubt like the prosecution. It is most unfortunate that the learned Judge in her brief judgment, running into 18 pages, has not properly considered the defence of the appellant accused which is probablised from the evidence of the prosecution witnesses itself.

8. It is no doubt true that Rajiben Ramjibhai, PW 6, Ex.22, claimed that her daughter Usha stated before her in the Hospital that her husband quarrelled with her in the morning as he wanted to take divorce and after pouring kerosene set her ablaze by saying that she was not of a good character and good lady and good wife. However, her evidence is not at all reliable because she has clearly admitted in her cross-examination that she had not made any complaint to anybody about Ushaben being not treated well by her husband. She has also admitted in her cross examination that because of love Usha got married with the accused which was not liked by her as she was not in favour of their marriage. She has also admitted that some times Usha was getting attack of

hysteria . Her second daughter Kankuben and son-in-law Govind were also staying at Valsad. Before meeting Usha she met both, Kankuben and Govindbhai. When she had a talk with Usha at that time her mother in law, who was staying with Usha, was present. However, she had admitted that Usha had never stated by writing letters to her about the ill-treatment meted out by her husband. Thus, from the aforesaid evidence of this witness Rajiben it appears that above two subsequent dying declarations Ex.15, stated to have been recorded by the Executive Magistrate Mrs.Patel and by Police in the form of FIR at Ex.36, the prosecution has tried to rely upon the third oral dying declaration, alleged to have been made by Usha before her mother Rajiben. No reliance can be placed on such testimony of Rajiben, who was totally hostile to the accused because her daughter had love marriage against her will.

9. This brings us to the subsequent dying declarations (i) Ex.15, stated to have been made by deceased Usha before the Executive Magistrate Mrs.Patel and (ii) in the form of FIR Ex.36, made before the Police, which are heavily relied upon by the learned Judge in her Judgment for convicting the accused.

First we will deal with the dying declaration ex.15 stated to have been recorded by Mrs. Patel, Executive Magistrate, Valsad. Deceased Ushaben has stated in her dying declaration that "today, my husband had quarrelled lot with me. Daily he comes after taking liquor and quarrelled and beat me by asking me to take divorce. Today, also he had beaten me after quarrelling with me and burnt me by pouring kerosene. At that time, I raised shouts, but nobody had come from the nearby and they were simply watching. My husband was also watching. Thereafter, he (her husband) came along with his friend and sprinkled water and extinguished the fire. Thereafter, my husband only brought me to this hospital. This so called dying declaration was recorded on 7.10.1995 between 12.55 to 13.15 hrs. It bears the signature of deceased Ushaben which is stated to have been made in presence of Mrs.Patel, PW 3, Ex.13. She has stated in her evidence before the Court that on 7.10.1995 at about 12.45 pm she received yadi from Valsad city Police Station for recording the dying declaration of Ushaben. On receiving the Yadi she had immediately rushed to the Valsad Municipal Hospital and asked one nurse about Ushaben. She told her that she is on the first floor. She went there in her room. Ushaben was lying in cot in a burnt condition. Her mother-in-law was sitting nearby her. She was asked to go out and

thereafter she closed the doors. Though Ushaben was burnt she was able to speak properly. On being asked about the incident, she narrated the incident as stated above and signed it. She has admitted in her evidence in chief that before recording the dying declaration of Ushaben she had not asked the doctor about the condition of Ushaben. However, in her cross examination she has stated that it has not happened that skin of the fingers of Ushaben were removed because of burns. However, she has admitted that because of burns injury Ushaben was having acute pain and suffering. She has denied that Ushaben was not in a condition to state. She has also denied that on the yadi received by them in their office there was no endorsement that she was competent to make statement. When she had gone to the Hospital at that time nearby the room she saw the police men coming out of the room.

10. From the aforesaid statement of Executive Magistrate Mrs.Patel, it is clear that before recording the dying declaration of Ushaben she had not bothered to go to the Doctor and sought his opinion as to whether Ushaben was in a fit state of mind to depose or not. If she had really gone to the hospital and recorded the dying declaration of Ushaben then she would have certainly noticed the skin on the fingers of the deceased Ushaben coming out. In spite of clear cut evidence of doctor, as stated earlier by us, she claimed that it had not happened that skin of fingers of deceased Ushaben had come out. Less said better about the so called dying declaration Ex.15 alleged to have been made by deceased Ushaben before the Executive Magistrate Mrs.Patel. It does not inspire any confidence. She had stated that after she was burnt by her husband she raised shouts, but people from neighbourhood were simply watching and nobody had come. Her husband was also watching and thereafter he came with his friend and sprinkled water and extinguished the fire and thereafter he himself brought her to the Hospital. If the accused wanted to kill his wife then there was no question of accused then trying to extinguish the fire with the help of his friend by sprinkling the water on his wife. She has not named the friend, but Jayantibhai Gohil, PW 1, Ex.6 has clearly stated in his evidence before the Court that the accused came to his house and told him that his wife had received the burnt injury and therefore he had gone to the house of the accused and then removed her to the Hospital. It is no doubt true that he has been declared hostile by the prosecution because he had not stated in his evidence what has been alleged to have been stated by him before the Police about the so called dying declaration made by

Ushaben before him that the accused was coming to house daily after taking liquor and quarrelling with her and on that day also he quarrelled and beaten and poured kerosene on her and burnt her. It has come on record of this case that where the accused was staying, about 50 to 60 houses were there as per the evidence of PSI Shri Varvaji Vaghela, PW 9, ex.31. He had recorded the statement of other witnesses also, but surprisingly for the reasons best known to the prosecution not a single independent witness was examined in this case, who stated to have witnessed the incident.

PSI Madhavsinh Rathod, PW 10, Ex.35, who has recorded the dying declaration in the form of FIR Ex.36, has also claimed that Ushaben had signed below her complaint Ex.36. The complaint seems to have been recorded only at 6.00 pm whereas this witness has clearly admitted in his cross examination that he had gone to record the FIR of Ushaben at 12.30 p.m. and before recording the FIR he had not obtained the Certificate of doctor about the physical or mental condition of Ushaben, and even after recording the complaint also he had not obtained the endorsement on FIR about the physical or mental condition of Ushaben. It is no doubt true that he has denied the suggestion in his cross examination that he had recorded the complaint of Ushaben as per the say of her sister and brother-in-law. He has admitted that Ushaben was suffering acute pain, in spite of it he was not prepared to admit that she was shouting. It is difficult to believe that any person receiving such serious burns injuries would not shout or scream. The most important aspect of the case is that he has admitted in his cross-examination that fingers of Ushaben were burnt and the skin had come out, in spite of it he was not prepared to admit that Ushaben was not in a position to hold the pen or sign. From the record before us we have tried to compare the two signatures of deceased Ushaben, one below Ex.15 and another at Ex.36. From the same we find that below the dying declaration ex.15 Ushaben had signed as "Usha Kishor Chavda" and below the FIR Ex.36 she has signed as "Ushaben Kishor Chavda". Apart from this, it appears to us that some one else has tried to forge the signature of deceased Ushaben and it is impossible for us to believe that these signatures were of deceased Ushaben.

11. Under the circumstances, we are not prepared to place any reliance on the evidence of Executive Magistrate Mrs.Patel, who claimed to have recorded the dying declaration of Ushaben at Ex.15 and the evidence of PSI Madhavsinh Rathod, who has recorded the dying

declaration in the form of FIR Ex.36.

12. It clearly appears to us that the learned Judge has totally overlooked and ignored the seriousness of Judgments of the Hon'ble Supreme Court on the point of recording of dying declaration and simply relied upon the dying declarations Ex.15 and Ex.36, stated to have been made before the Executive magistrate and Police Officer respectively in this case on the ground that they are Government Officer, therefore, they had no reason to falsely depose against the accused. Unfortunately, the learned Judge has not at all properly appreciated the evidence of both these witnesses, Executive Magistrate Mrs.Patel and PSI, Shri Rathod in its proper prospective. If she had properly considered the facts which we have stated in detail in this Judgment, then she would not have come to the conclusion that the accused was guilty. At the cost of repetition, we may state that the dying declaration made by deceased Ushaben before Dr.Ramavat was first in point of time and all the other relevant circumstances supports the theory of accidental death and not of homicidal death.

13. Before parting, we must state that after passing the impugned Judgment and order of conviction and sentence on 27.1.1997 the learned Judge passed another order Ex.41 at running page 165, on the same day i.e. on 27.1.1997, as it appears that after the impugned Judgment and order of conviction and sentence was passed by the learned Judge the accused got provoked and threw the slippers on the learned Judge and gave filthy abuses to the learned Judge for falsely convicting him and threatened her to kill, for the same the learned Judge had ordered her Sheristedar Shri M.B.Gard to lodge complaint before the Police. In our considered opinion, this was not in a good taste and not needed at all. This court is not going to be prejudiced with this type of orders at Ex.41. The Court has to decide the case on merits of the case and no other consideration should weigh with it. With this observation, this Appeal stands allowed.

14. In view of the above discussion, this Appeal is allowed and the impugned Judgment and order of conviction and sentence dated 27.1.1997 passed by the learned Sessions Judge, Valsad at Navsari, in Sessions Case No.31 of 1996, convicting the Appellant - accused Kishorbhai Bhanabhai Chavda for the offence u/s.302 I.P.Code and sentenced him to suffer Life Imprisonment and to pay fine of Rs.500/- i/d to under-go one month SI is quashed and set aside. Fine if paid, be refunded to the appellant

accused forthwith. If the presence of appellant-accused is not needed in any other case then he may be set at liberty forthwith.

(B.J.Shethna, J.)

Date : March 31, 2004

(J. R. Vora, J.)

sas